Nos. 76-158, 76-159 AND 76-334

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW VALENTINE AND VALENTINE ELECTRIC COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH DIACO, PETITIONER

v.

UNITED STATES OF AMERICA

NORMAN DANSKER, STEVEN HAYMES, AND DONALD ORENSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
ROBERT H. PLAXICO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals[1] is reported at 537 F. 2d 40 (Pet. App. 1a-46a).

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 76-334. "Dansker Pet." refers to that petition, "Val. Pet." refers to No. 76-158, and "Diaco Pet." refers to No. 76-159. "Tr." refers to the transcript of the trial.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67a-68a), was entered on June 2, 1976. Petitions for rehearing were denied on July 7, 1976. Petitioners in Nos. 76-158 and 76-159 filed petitions for a writ of certiorari on August 5, 1976. The time for filing the petition in No. 76-334 was extended by Mr. Justice Brennan until September 3, 1976 (see Pet. App. 71a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners participated in a scheme to obtain zoning variances. They were convicted under the Travel Act on two substantive counts—based on bribery of a community spokesman opposed to the variances and a local official, respectively—and on a conspiracy count based on an agreement to bribe both. The court of appeals reversed the convictions for bribery of the spokesman on the ground that it was not a crime. It reversed the conspiracy convictions because the jury might have found an agreement to bribe only the spokesman, a non-crime. However, it affirmed the convictions for bribery of the official.

The questions presented are:

1. Whether the court of appeals properly affirmed petitioners' convictions for bribery of the official.

2. Whether the trial judge should have recused himself because, while United States Attorney, he had investigated a company involved in the scheme in connection with other offenses.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to violate the Travel Act, 18 U.S.C. 1952, by

bribery in violation of New Jersey law (count I), and with substantive violations of the Act consisting of the bribing of Burt Ross, the Mayor of Fort Lee, New Jersey (count II) and the bribing of Nathan Serota, vice-chairman of the Fort Lee Parking Authority (count III). The individual petitioners were each sentenced to concurrent five-year prison terms, and all petitioners were fined $10,000 on each count. The court of appeals affirmed the convictions on the Ross bribery count but reversed the convictions on the Serota bribery, and the conspiracy counts (Pet. App. 1a-46a).

The evidence is set forth in some detail in the opinion of the court of appeals (Pet. App. 3a-8a). In 1971, Arthur Sutton began acquiring real estate in Fort Lee, New Jersey, for commercial development. In 1972, petitioners Dansker, Haymes, and Orenstein, officials of Investors Funding Corporation (IFC), agreed on IFC's behalf to assist Sutton's project by advancing the funds to be paid to sellers when acquisitions were made (VI Tr. 1308-1320). The Sutton-IFC group wanted to build a huge shopping complex on the property, but much of the land was zoned non-commercial. Accordingly, in December 1973 Sutton and Dansker petitioned the Fort Lee Board of Adjustment for a zoning variance (VI Tr. 1332, 1345; Pet. App. 4a). By March 1974, the Board began hearings on the project. Meanwhile, IFC was in serious difficulty. It was unable to meet its contractual commitments to those from whom Sutton had purchased property; while Orenstein sometimes was able to negotiate extended payment schedules, this resulted in increased interest charges and, in some instances, higher acquisition costs (VI Tr. 1347-1351).

In the meantime, strong public opposition to the rezoning was voiced, headed by co-defendant Serota, vice-chairman of the Fort Lee Parking Authority, who resided in a condominium located near the proposed project. He paid

for opposition advertisements in local papers, organized and financed a slate of opposition candidates for the local Borough Council, and organized lobbying efforts directed at the Board of Adjustment. By April 1974, it became apparent that the zoning petition would fail (Pet. App. 4a-5a).

At that time, petitioner Valentine, president of Valentine Electric Company, approached Sutton and offered to assist in securing approval of the variance in return for the electrical contract for the proposed complex. Valentine told Sutton that he had assisted others in securing favors from the Mayor of Fort Lee, Burt Ross. When Sutton called Orenstein about this, he was told to pursue the matter (VI Tr. 1368-1372). Sutton then met again with Valentine, who stated that approval of the zoning variance could be obtained by purchasing Serota's apartment for an inflated price and by paying off the mayor (VI Tr. 1380-1381). Sutton discussed this proposal with petitioners Dansker and Orenstein; they approved and agreed to finance it (VI Tr. 1382-1393; Pet. App. 5a).

Valentine thereupon contacted Serota and worked out an arrangement by which IFC was to purchase Serota's $500,000 condominium apartment for $900,000 and pay Serota an additional $200,000 in cash at the closing. In return, Serota agreed to cease opposition to the project and to support its approval in a modified form. The sale to Orenstein's brother-in-law was consummated on May 15, 1974. The contract incorporated Serota's agreement to terminate his opposition but did not mention the additional $200,000 payment (Pet. App. 5a-6a).[2]

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[2]In addition, Serota was permitted to sublease the apartment, rent free, until 1978.

On May 19, 1974, Mayor Ross was approached by petitioner Diaco, another official of Valentine Electric. Diaco used an assumed name (III Tr. 641-643) and asked if the Board of Adjustment's decision, scheduled for May 22, could at least be postponed. Ross was not cooperative. Diaco then asked, "Would money be help?" Ross secretly reported the incident to the United States Attorney the following morning (III Tr. 647; Pet. App. 6a).

On May 22, Diaco met with Ross and again asked for a delay. He said that "Serota has been taken care of" (III Tr. 648). He offered Ross first $200,000, then $400,000 for his assistance (III Tr. 669). While Diaco and Ross were talking, Orenstein and another individual appeared in the mayor's waiting room and sought to speak with him, but the mayor refused to see them (III Tr. 669-674). Orenstein had come, apparently, because he and the other IFC participants were becoming increasingly desperate to secure the zoning variance.

That evening, Diaco twice called Ross from Sutton's office. In the first call he offered a bribe of $500,000, but also threatened to expose something about Ross's administration (IV Tr. 693-697, 709, 710-726). Diaco made these calls in the presence of Sutton and Orenstein. While Diaco was making the first call, Orenstein was talking to Dansker and Haymes on another line, keeping them apprised of the situation. When Ross again said he could not postpone the meeting, Orenstein called to Diaco, "offer him anything" (VII Tr. 1566-1567). Diaco made a second call repeating his offers and threats, while Orenstein simultaneously telephoned Haymes and Dansker (VII Tr. 1569-1573).

The Board met as scheduled and rejected the zoning petition. Dansker then told Sutton to get the matter back on the Board's agenda as quickly as possible. Sutton again

sought Valentine's help (VII Tr. 1573-1579). Thereafter, on May 24, Diaco met with Ross, who purported to agree to sponsor a modified zoning plan in return for a $100,000 advance, plus $200,000 to $400,000 later. Valentine reported this to Sutton. Sutton said he could raise only $100,000; Valentine then gave Sutton $200,000 in cash in return for a $270,000 check (VII Tr. 1576-1582). Diaco and Sutton met with Ross again on May 26, and Diaco gave Ross $100,000 in cash, which he turned over to the FBI.

Sutton then called Haymes and Dansker to inform them of Ross's cooperation (VII Tr. 1584-1587). The next day, Sutton called Haymes and told him that he had written a check to obtain the funds to pay Ross and that he had to be reimbursed in order to cover the check. Haymes told him that "he will arrange it, not to worry, that they'll get money some place" (VII Tr. 1593).

2. In reversing petitioners' convictions based upon the Serota transaction (count III), the court of appeals held that, because Serota lacked actual or apparent authority to influence the zoning variance proceeding in an official capacity, the payment to him did not constitute illegal bribery under state law. Therefore it ruled no offense under the federal Travel Act, 18 U.S.C. 1952, was shown (Pet. App. 8a-17a).

Turning to the conspiracy conviction (count I), the court rejected the government's argument that the jury's conviction of the defendants on both substantive counts necessarily showed that the jury found a conspiracy to bribe Ross. The court noted that "[t]he district court * * * instructed the jury that if it found that the alleged conspiracy had as its illegal objective *either* the bribe of Ross or Serota it could convict the defendants" (Pet. App. 17a; emphasis in original). Since the jury could thus have found agreement to bribe Serota, but not Ross, the court reasoned

that "the possibility thus remains, albeit slim, that the jury found the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II" (the Ross bribery) (Pet. App. 18a). Consequently, the court vacated the conspiracy conviction and remanded for a new trial on the Ross conspiracy only.

As to the substantive Ross bribery count (count II), however, the court affirmed. It held that the jury's deliberations were not tainted by the evidence relating to the conspiracy count. "The evidence concerning the two bribes was of such a nature that it could be easily compartmentalized by the jury and then considered independently by it under each separate count of the indictment" (Pet. App. 19a). It further held (*ibid.*):

> In any event, nearly all of the evidence concerning the defendants' dealings with Serota would have been admissible even if Count III had not been included in the indictment. The Serota transaction was an integral part of the defendants' scheme to obtain the variances needed for their project. Hence, evidence concerning it was clearly relevant to show the defendants' motive in approaching Ross with their proposition as well as their modus operandi.

The court also held that the trial judge did not err in refusing to disqualify himself under 28 U.S.C. 144. It concluded that the defendants' affidavits of bias under Section 144 were legally insufficient because they did not allege personal bias on the part of the trial judge (Pet. App. 19a-23a).

ARGUMENT

1. Petitioners in Nos. 76-158 and 76-334 contend that the court of appeals should have set aside their convictions

based on the Ross bribe (count II), because it reversed their convictions on the Serota bribery count and the conspiracy count.

a. In effect, petitioners argue that given the instructions and evidence in this particular record, the Ross conviction must have been based in whole or part on the reversed convictions. However, as the court of appeals recognized, the Serota transaction "was an integral part of the defendants' scheme" to obtain variances (Pet. App. 19a). Since the jury convicted on all three counts, it necessarily must have found a concerted scheme to bribe both Mayor Ross and Serota. The court of appeals' legal conclusion that the bribery of Serota is not an offense under state law did not in any way undermine the finding the jury must have made that petitioners, together with Sutton, had agreed to a scheme to buy off Serota and Mayor Ross. The court of appeals erred therefore in vacating the conviction on the conspiracy counts and remanding it for a new trial.

Petitioners predicate their claims on this erroneous vacation of the conspiracy count. We submit, however, that those claims do not present any general issue warranting review by this Court. At most the effect of the error was to create the appearance of inconsistency in what was previously a wholly consistent jury verdict. Inconsistency is not a ground for reversal when it appears in an original verdict. *Hamling* v. *United States,* 418 U.S. 87, 101. There is no reason for a different result when the decision of a court of appeals creates an inconsistent verdict, particularly when the claimed inconsistency results from an erroneous overturning of a previously consistent jury determination.[3]

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[3]In so contending, of course, we do not suggest that the judgment of the court of appeals vacating the conspiracy conviction can be disturbed. No petition for a writ of certiorari to review that aspect of the judgment has been filed by the government.

b. Petitioners assert that the Court should review this case in order to establish guidelines for the courts of appeals in disposing of substantive counts when they reverse jointly tried conspiracy counts. But the disposition of such cases depends upon detailed analysis of the testimony and other evidence developed at trial. That analysis has already been made by the court of appeals; there is no reason for this Court to undertake it again.

Petitioners claim that they were prejudiced because, they speculate, the jury might not have believed the testimony of Arthur Sutton, the developer who initiated the project, who directly participated in the formulation of the bribery scheme, and whose testimony linked defendants Valentine and Diaco with the IFC defendants, Dansker, Haymes and Orenstein. Sutton gave direct, admissible evidence as to the details of the scheme. But he had also pleaded to a lesser offense, arguably had a strong personal motive for testifying on the government's behalf in hope of winning a more lenient sentence, and his testimony implicating the IFC defendants (Dansker, Haymes, and Orenstein), as well as Valentine, was not corroborated by tapes or other direct evidence.

We submit that the jury must have believed Sutton's direct evidence or it would not have convicted the IFC defendants and Valentine on both substantive counts. In any event, contentions as to whether the jury in a particular case might have disbelieved admissible evidence directly supporting its verdict furnish no basis for review by this Court.

Petitioners' interpretation of the record, moreover, is unsound. They contend that the jury must be deemed to have found that they conspired to bribe only Serota (Dansker Pet. 17). From this they theorize that the jury must have imputed to them vicarious liability for bribing Ross

because two of their co-conspirators in the Serota scheme (Sutton and Diaco) were directly involved in bribing Ross (Dansker Pet. 19) Their argument assumes, that in determining criminal responsibility for the Ross bribe, no effect whatever may be given to the jury's finding that petitioners jointly participated in buying off Serota, because the bribery of Serota was not a crime. But the noncriminal nature of the Serota bribe did not foreclose the court of appeals or the jury from finding that "the Serota transaction was an integral part of the defendants' scheme to obtain the variances" (Pet. App. 19a). Equally integral to the scheme was the bribery of Ross. The scheme to obtain the variances thus constituted a single joint venture in which all were involved, and for which all are responsible under basic principles of agency, even when no conspiracy has been charged. See, *e.g.*, *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *Davis* v. *United States*, 409 F. 2d 1095, 1100 (C.A. 5); *United States* v. *Alsondo*, 486 F. 2d 1339, 1346-1347 (C.A. 2); *United States* v. *Golden*, 532 F. 2d 1244 (C.A. 9).

For example, in *United States* v. *Alsondo, supra*, the court of appeals sustained a conviction for the substantive offense of assaulting federal narcotics agents on the ground that the defendant participated in a joint venture to commit the crime, even though a simultaneously tried conspiracy conviction was reversed because of failure to prove scienter,[4] and even though the defendant did not participate in the assault.

The same agency principles permit the admission against all of each participant's acts and declarations in furtherance of the joint venture, even though conspiracy is not charged.

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[4]The scienter aspect of the decision was later reversed in *United States* v. *Feola*, 420 U.S. 671.

Fed. R. Evid. 801(d)(2)(E). See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26 (1974).

The evidence relating to the bribery of Serota was also admissible on the Ross count to show the motive, intent and method of operation of the participants in the scheme to obtain the variances. Fed. R. Evid. 403, 404(b).

Since the acts and declarations of the joint venturers in furtherance of the scheme to obtain the variances were properly admitted into evidence, the jury could, as the district court instructed, deem them "to be the acts of all of them and all of them are responsible for such acts if you find as to any particular defendant * * * that he has become a member of the conspiracy" (XI Tr. 3876, see also XV Tr. 3877-3878 and 3881). In any event, the trial court also cautioned the jury to consider each defendant's case separately (XV Tr. 3856, 3914) and it must be presumed that the jury obeyed these instructions.

c. The decision below is not in conflict with decisions of any other court of appeals. *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), is distinguishable. In that case a conspiracy conviction was set aside on the ground that the evidence was insufficient to connect the defendant to the alleged scheme. In these circumstances, the basis for the jury's consideration of the acts and declarations of the other conspirators against the defendant was undermined, and the substantive conviction was therefore reversed. In the case at bar, however, the conspiracy conviction was not reversed because the evidence was insufficient to tie the defendants to the basic joint venture, but because one aspect of it was not criminal.

Petitioners in No. 76-158 also claim that the decision below is in conflict with two other decisions of the court below and a decision of the Second Circuit (*United States* v. *DeCavalcante*, 440 F. 2d 1265, 1276 (C.A. 3); *Levy*

v. *Parker*, 478 F. 2d 772, 798 (C.A. 3); *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 865 (C.A. 2)) as to the proper test to be utilized in determining whether evidence relating to reversed counts has affected a jury's consideration of remaining valid counts. According to petitioners, under these cases the test is whether there exists a "reasonable possibility" of taint (Val. Pet. 15-16). But that was the test utilized below. The court of appeals concluded that "we believe that there was little possibility that the jury relied on improper evidence in reaching its guilty verdict" (Pet. App. 19a).[5]

2. Petitioners Valentine, Valentine Electric Company, and Diaco contend that the affidavits they filed pursuant to 28 U.S.C. 144[6] were sufficient to require the trial judge, to recuse himself on the ground that he was personally biased against them.[7] The affidavits pointed out that Valentine and

[5]The IFC petitioners also claim (Dansker Pet. 33) that the prosecution withheld evidence which might have been exculpatory, in violation of the due process requirement of *Brady* v. *Maryland*, 373 U.S. 83. The court of appeals correctly held (Pet. App. 46a), however, that this claim should be first presented to the trial court. Their further claim that the effect of the reversals of the Serota counts were not adequately argued before the court issued its opinion is refuted by that opinion (Pet. App. 17a-19a), and by the court's denial of the petition for rehearing (Pet. App. 69a).

[6]This statute provides that a judge is disqualified to sit in a case "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."

[7]An initial indictment charged only Sutton and Diaco in a single count. Petitioner Diaco filed a motion for recusal against the district court judge and after a hearing, this motion was denied. Sutton then agreed to cooperate with the government and the first indictment was superseded by a second which charged petitioners and their co-defendants in three counts. Petitioner Diaco then moved a second time

Diaco had been principals of Valentine Electric since its formation in 1958, and that the trial judge, as United States Attorney for New Jersey between 1969 and 1971, had investigated the company. During this investigation, he made public statements concerning the company's underworld connections and invited competitors to voice any complaints to his office. The investigation eventually resulted in the indictment and conviction, for various extortion offenses, of Anthony Boiardo, then owner of one-third of Valentine Electric's stock, and Joseph Biancone, a Valentine employee.

As the court below pointed out, however, petitioners made "a number of significant concessions in their affidavits" (Pet. App. 21a). They acknowledged that Judge Lacey's statements were directed against Boiardo, the controlling figure of Valentine Electric, and that he had terminated all connections with the company in 1970. They also admitted that at the end of 1970, Judge Lacey's first assistant advised a law firm seeking to represent the company that "there was no longer any basis for believing that its principals were engaged in criminal activity" (*ibid.*). Further, the affidavits did not allege that petitioners Diaco or Valentine themselves were personally the targets of any investigation at any time.

The court of appeals carefully reviewed the affidavits and concessions made by petitioners, but found (Pet. App. 22a):

> Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or,

for recusal and was joined by petitioner Valentine and Valentine Electric Company. This motion was also denied. The second indictment was in turn superseded by a third, in order to correct certain technical defects. Diaco again moved for recusal, which was again denied.

> for that matter, any emotion whatsoever towards them personally.

Absent assertions of personal bias the allegations were insufficient. As the court of appeals held: "[A] trial judge need only recuse himself if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial, bias against the movant" (*ibid.*).[8] Since the trial judge's earlier statements had not focused upon petitioners, it is difficult to perceive how he could have entertained "a closed mind on the merits of * * * [their] case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583.[9]

Petitioners also contend that the district court improperly substituted his "outside recollection for facts alleged in the affidavit" (Diaco Pet. 7).[10] At the hearing on their first recusal motion, petitioner Diaco was represented

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[8]This is the same test imposed by 28 U.S.C. 455, as recently amended, by Pub. L. 93-512, 88 Stat. 1609, which is cited by petitioner Diaco (Diaco Pet. 14). That Section requires disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." Removal is thus mandated only "if there is a reasonable factual basis for doubting the judge's impartiality * * *" H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974).

[9]28 U.S.C. 144 does not require disqualification of a judge who has previously presided over a trial at which the movant was found guilty in either the same case or another one, or one in which persons alleged to have conspired with movant were found guilty. See *United States* v. *DiLorenzo*, 429 F. 2d 216, 220-221 (C.A. 2), certiorari denied, 402 U.S. 950; *Wolfson* v. *Palmieri*, 396 F. 2d 121 (C.A. 2); *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845.

[10]Under Section 144 the trial court must accept the facts alleged as true and can only determine whether, accepted as true, they state a case of personal bias. See *Berger* v. *United States*, 255 U.S. 22, 33-34; *Davis* v. *Board of School Comm'rs of Mobile County*, 517 F. 2d 1044, 1051 (C.A. 5); *United States* v. *Trevithick*, 526 F. 2d 838 (C.A. 8); *United States* v. *Thompson*, 483 F. 2d 527, 529 (C.A. 3).

by the same firm that had been advised in 1970 that there was no longer any basis to believe that principals of Valentine Electric were engaged in any criminal activity. Nevertheless, this advice was not mentioned in the affidavit the firm submitted, even though it was accompanied by a certificate of good faith. The partner in charge of Diaco's case, Joseph McMahon, who was aware of this advice, did not appear at the hearing, nor did he sign the certificate. Instead another attorney from the firm handled the matter. At the judge's request, McMahon subsequently appeared and stipulated that the advice had been communicated. The trial judge then declined to disqualify himself, and Diaco retained his present counsel. The information elicited at the first hearing was included in the Section 144 affidavits subsequently submitted.

There was no error. The trial judge did not contest the accuracy of the facts initially alleged in the first Section 144 affidavit; he simply inquired whether the firm which had submitted the accompanying certificate of good faith had overlooked relevant facts known to the partner representing Diaco, as a result of assigning another attorney to the recusal motion. In any event, since those facts were included in the subsequent Section 144 affidavits, the court of appeals properly considered them in its review of the trial court's action on the subsequent motions.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
ROBERT H. PLAXICO,
Attorneys.

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